

# SCC Competition Law Class Action Decisions

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On October 17, 2012, the Supreme Court of Canada heard argument in three appeals relating to the certification (in Quebec, the authorization) of class actions: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, *Infineon Technologies AG v. Option Consommateurs*, and *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*. More than a year later, on October 31, 2013, the Court released its eagerly awaited decisions. While the appeals touched on multiple issues, the core questions were whether indirect purchasers (i.e. those parties, such as retailers and consumers, who purchase the product in question subsequent to the initial purchase from the alleged violator) can be claimants in class actions, and the standard of proof to be applied at certification hearings, particularly with respect to the commonality of issues and preferable procedure requirements.

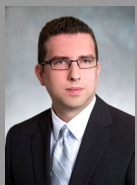
The Court has decided that, despite the complex evidentiary problems involved, indirect purchaser class actions can proceed, as long as the expert testimony supporting certification is “sufficiently credible or plausible to establish some basis in fact for the commonality requirement” of the class proceedings legislation. The plaintiffs’ expert’s methodology “must offer a reasonable prospect of establishing a loss on a class wide basis.” This is the opposite of the approach adopted by the U.S. Supreme Court, which several decades ago ruled that indirect purchaser claims could not be pursued, and to the prevailing practice in the United States where certification proceedings are often more rigorous than in Canada. As the unanimous reasons of the Supreme Court of Canada put it: “Resolving conflicts between the experts is an issue for the trial judge and not one that should be engaged in at certification.”

One can therefore expect that the complex evidentiary issues associated with indirect purchaser class actions will now be thrashed out at trial, rather than at certification, and that, as a result, there will likely be many complex and lengthy trial proceedings in Canada.

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